

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of MICHAEL L. ROSENBAUM and GALLAUDET UNIVERSITY,
Washington, DC

*Docket No. 96-2469; Submitted on the Record;
Issued August 3, 1999*

DECISION and ORDER

Before DAVID S. GERSON, WILLIE T.C. THOMAS,
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs met its burden of proof to rescind acceptance of appellant's claim.

In the present case, the Office accepted that appellant, a teacher, at Gallaudet University, sustained right-sided neuroma, ulnar nerve compression and left-sided ulnar neuropathy as a result of his signing duties on or about November 22, 1988. The Office rescinded acceptance of appellant's claim by decision dated May 3, 1996 and terminated all benefits effective that day, on the grounds that appellant was not an "employee" as defined by section 8101(1)(A) of the Federal Employees' Compensation Act¹ and, therefore, was not entitled to receipt of compensation benefits under the Act.

The Board has upheld the Office's authority to reopen a claim at any time on its own motion under section 8128(a) of the Act² and, where supported by the evidence, set aside or modify a prior decision and issue a new decision.³ This holds true where the Office later decides that it erroneously accepted a claim.⁴ The Board has noted, however, that the power to annul an award is not an arbitrary one and that an award for compensation can only be set aside in the manner provided by the compensation statute.⁵ It is well established that once the Office accepts a claim, it has the burden of justifying termination or modification of compensation.⁶ To justify

¹ 5 U.S.C. § 8101(1)(a).

² 5 U.S.C. § 8128(a).

³ *Sheila A. Johnson*, 46 ECAB 323 (1994).

⁴ *Roland E. Umphrey*, 46 ECAB 509 (1995).

⁵ *Shelby J. Rycroft*, 44 ECAB 795 (1993).

⁶ *See Frank J. Mela, Jr.*, 41 ECAB 115 (1989).

rescission of acceptance, the Office must establish that its prior acceptance was erroneous based on new or different evidence or through new legal argument and/or rationale.⁷

In a memorandum to the Director dated April 1, 1996, the Office claims examiner explained that as a result of an inquiry from Gallaudet University regarding its workers' compensation costs and whether its employees were properly considered federal employees within the meaning of the Act, the Office had further evaluated the issue of coverage of Gallaudet employees under the Act. The claims examiner stated that based upon this inquiry, the Office had determined that Gallaudet University employees were not federal employees, for the Act purposes.

The Board finds that the Office met its burden of proof to rescind acceptance of appellant's claim.

At the time the Office accepted appellant's claim, the Office did not evaluate whether appellant, as an employee of Gallaudet University, was in fact an "employee" pursuant to the terms of the Act. An essential element of each claim under the Act is that the claimant be a civil employee of the United States at the time of injury.⁸ During 1996 the Office made a new legal determination that employees of Gallaudet University were not federal employees pursuant to the Act.

The Board has previously considered this issue and has determined in *Barbara L. Riggs*,⁹ that Gallaudet University employees are not federal "employee[s]" pursuant to the Act. For purposes of determining entitlement to compensation benefits under the Act, an "employee" is defined, in relevant part, as:

"(A) a civil officer or employee in any branch of the Government of the United States, including an officer or employee of an instrumentality wholly owned by the United States...."¹⁰

Appellant must therefore establish that Gallaudet University is either a part of a branch of the United States Government or that it is wholly owned by the United States, pursuant to section 8101(1)(A), in order to establish that he is an "employee" entitled to compensation. The Board noted that unlike the United States Postal Service, which was "established, as an independent establishment of the executive branch of the Government of the United States,"¹¹ Gallaudet University is not, by statute, a part of any branch of the United States government.¹²

⁷ See *Laura H. Hoexter (Nicholas P. Hoexter)*, 44 ECAB 987 (1993).

⁸ See *Dennis G. Nivens*, 46 ECAB 926 (1995).

⁹ 50 ECAB ___ (Docket No. 97-1322, issued November 6, 1998).

¹⁰ 5 U.S.C. § 8101(1)(A); see also 20 C.F.R. § 10.5(a)(11).

¹¹ 39 U.S.C. § 201.

¹² 20 U.S.C. § 4301 *et seq.*

Moreover, Gallaudet University is not wholly owned by the United States as is the Smithsonian Institution, which was established as a trust instrumentality of the United States.¹³ The Board therefore concluded in *Riggs*, that because Gallaudet University is neither a part of any branch of the United States Government nor wholly owned by it, appellant was not an “employee” pursuant to the Act.¹⁴

The Office’s 1996 legal determination that Gallaudet employees are not “employee[s]” pursuant to the Act was a proper interpretation of the Act, was a new legal determination and was a basis for rescission of the claim.¹⁵

Appellant asserts on appeal that the Office should be equitably estopped from rescinding acceptance of his claim. In the *Riggs* case,¹⁶ the Board found that equitable estoppel was inapplicable inasmuch as section 8128(a) of the Act provided that the Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.

¹³ Compare 20 U.S.C. § 41 *et seq.*; *George Abraham*, 36 ECAB 194 (1984).

¹⁴ In the *Riggs* case, the Board noted appellant’s assertions that Gallaudet University was established by the federal government; that pursuant to 20 U.S.C. § 4361, the Secretary of Education is charged with the supervision of “the public business relating to Gallaudet University”; that pursuant to 20 U.S.C. § 4303(a), one United States Senator and two members of the United States House of Representatives are required to serve on Gallaudet University’s 21-member Board of Trustees; that the federal government appropriated funds for Gallaudet University pursuant to 20 U.S.C. § 4360(a); that the University is accountable to the United States Department of Education for the spending of all federal funds pursuant to 20 U.S.C. § 4363; that the University is authorized to make purchases through the General Services Administration pursuant to 20 U.S.C. § 4362; and that Gallaudet University cannot dispose of its federal property without the approval of the Secretary of Education, pursuant to 20 U.S.C. § 4302(b). The Board found, however, that these assertions did not establish that Gallaudet University was either a part of a branch of the United States government or that it was wholly owned by the United States.

¹⁵ On appeal appellant asserted the same factors cited by appellant in *Riggs*, as noted in footnote 14, *supra*, to establish a federal nexus. Further, in this case appellant’s representative alleges that in 1992 Congress adopted the “Education of the Deaf Act Amendments of 1992” (P.L. 102-421, October 16, 1992) acknowledging again by its actions that Gallaudet is to be seen as and is treated as a branch of the United States government.” The Board is limited to review of evidence which was before the Office at the time of its final decision. 20 C.F.R. § 501.2(c).

¹⁶ *Supra*, note 9.

The decision of the Office of Workers' Compensation Programs dated May 3, 1996 is hereby affirmed.

Dated, Washington, D.C.
August 3, 1999

David S. Gerson
Member

Willie T.C. Thomas
Alternate Member

Michael E. Groom
Alternate Member